

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

TYRONE KEYS :  
v. Plaintiff, :  
BERT BELL/PETE ROZELLE Case No. 8:18-cv-02098-CEH-JSS  
NFL PLAYER RETIREMENT PLAN :  
and the NFL PLAYER DISABILITY :  
& NEUROCOGNITIVE BENEFIT :  
PLAN :  
Defendants. :  
\_\_\_\_\_ :

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION  
TO DISMISS COUNT III OF PLAINTIFF'S FIRST AMENDED COMPLAINT**

**Introduction**

Defendants move to dismiss Count III, arguing that: 1) the legal doctrine of equitable estoppel cannot apply in an ERISA case unless the estoppel claim meets the offensive use of equitable estoppel recognized in *Jones v. Am. Gen. Life & Acc. Inc.*, 370 F.3d 1065 (11<sup>th</sup> Cir. 2004); and 2) ERISA preempts any state law equitable estoppel claim. As elaborated upon below, Plaintiff's Count III should not be dismissed for either reason.

**Standard of Review**

In reviewing a motion to dismiss for failure to state a claim, the allegations set forth in the plaintiff's complaint must be accepted as true, construed in the light most favorable to the plaintiff. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11<sup>th</sup> Cir. 2012). The complaint must have sufficient factual matter accepted as true to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

**Plaintiff's Count III: Equitable Estoppel Based Upon Silence**

**A. The Complaint Meets the Elements of Equitable Estoppel Based Upon Silence**

In Count III of his First Amended Complaint, Keys alleges that the Plan Administrators, being the Disability Initial Claims Committee (DICC) and the Retirement Board, intentionally remained silent about his 2002 car accident for years in order to use it later to their advantage. Am. Compl. ¶¶ 45-46 (Doc. 35). Although the Plan Administrators knew about the accident in 2004, and had a duty to inquire about it during the initial claims process if they felt the accident had a bearing on Keys' claim for T&P disability benefits under the Plans, they intentionally remained silent about the accident for thirteen years. Am. Compl. ¶¶ 44-46. The Plan Administrators finally broke their silence in 2017, electing to allege fraud against Keys by falsely claiming they knew nothing about the accident when Keys' claim was initially considered in 2003 and 2004. Am. Compl. ¶¶ 45-46.

Keys alleges in his First Amended Complaint that he detrimentally relied upon the Plan Administrators' silence. Am. Compl. ¶¶47. Had the Plan Administrators asked Keys for information regarding the accident during the initial claims process, Keys alleges he could have provided them an Independent Medical Examination (IME) report from March 2003 performed by Dr. Howard Hochman that proved he had no residual signs of injury from the car accident. Am. Compl. ¶¶ 48-49.

The Board members claim that Keys owes the Plans over \$831,488.28 plus interest based upon their false allegation they had no notice of the accident and their mistaken conclusion that it was the 2002 accident, rather than playing in the NFL, that caused Keys to have the disabling conditions that are listed in his benefit application. Am. Compl. ¶31. Moreover, the Board members claim that their neutral physicians, who found Keys disabled as a result of his NFL career,

were allegedly deprived of information concerning the 2002 car accident, which deprivation led the neutral physicians to the wrong conclusions, which in turn, according to the Board members, led them to the wrong conclusion as to the cause of Keys' disability. Am. Compl. ¶50.

Those contentions, set forth in their denial letters in 2017 and 2018, are contingent upon the Plan Administrators' intentional silence about the accident during the initial claims process. Had the Plan Administrators asked Keys for information about the accident in a timely manner, he could have provided them the IME report from Dr. Hochman that proved that by the time he applied for T&P disability benefits with the NFL Plans, he had no residual signs of injury from the 2002 car accident. Thus, the DICC and Board's thirteen-year silence about the accident misled Keys to his detriment. Further, the DICC and the Board intended or reasonably anticipated that Keys would rely upon their silence to his detriment. Am. Compl. ¶46.

Keys' Count III presents a cause of action for equitable estoppel by silence that meets the elements set forth in *United States Life Ins. Co. in the City of New York v. Logus Mfg. Corp.*, 845 F. Supp. 2d 1303, 1318 (S.D. Fla. 2012). The Plan Administrators had a duty to speak when they first learned about the accident in 2004 if they honestly believed the accident might have caused Keys' disability. Instead, the DICC and Board remained silent, intending to later use their knowledge of the accident to their advantage. Keys relied upon their silence. He did not provide Dr. Hochman's IME report with his initial claim because the Plan Administrators did not indicate they wanted more information about the accident. The DICC and the Board intended, or reasonably anticipated, that their silence would cause Keys to not provide more information about the car accident.

Had the DICC and the Board not been silent about the accident, Keys would have acted differently. Specifically, he would have provided Dr. Hochman's report during the initial claims

process. This would have prevented the Board from claiming thirteen years later that the Plans' neutral physicians were led to false conclusions by the absence of information about the car accident, which in turn, according to the Board members, led them to a false conclusion as to the cause of Keys' disability. The Plan Administrators' intentional silence caused Keys to suffer injury. This is a federal common law cause of action recognized by the Eleventh Circuit. *Whetstone Candy Co., Inc. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1076 (11<sup>th</sup> Cir. 2003) ("Equitable estoppel sometimes applies when there is, as here, merely silence or inaction, but the doctrine only applies in such circumstances when the other party is misled to his or her injury.") (internal quotes and cite omitted).

#### **B. Keys' Claims for Equitable Estoppel by Silence Should Not be Dismissed**

The Defendants argue that the *Jones* case makes it clear that in the Eleventh Circuit, equitable estoppel in ERISA cases does not extend to equitable estoppel by silence. Defendants' Motion to Dismiss at p. 3 (Doc. 38). Defendants misinterpret *Jones* as *Jones* addresses the elements of the offensive use of equitable estoppel applied when a participant is requesting plan benefits based upon misrepresentations made by plan administrators concerning an ambiguous plan. *Jones*, 370 F.3d at 1069.

Unlike the circumstances of *Jones*, in Count III Keys is not seeking to obtain benefits from the Plans as a result of a misrepresentation. Rather, he seeks to retain benefits already paid to him, *i.e.* to defend against the continuous claw back of his benefits by the Plan Administrators. Keys' Count III is a defensive use of equitable estoppel. The *Jones* case does not foreclose a defensive use of equitable estoppel in ERISA benefit cases. The Defendants strain to shackle the Court's equity powers in ERISA benefit cases, even under the unique factual circumstances presented here. A court's power to fashion equitable relief is not eviscerated simply because this is an ERISA

benefits case.

**1. The Rules for Analyzing Whether or Not a Federal Common Law Doctrine Should be Adopted in an ERISA Case**

A hallmark of equity is its flexible application. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984). Although equitable estoppel comes in many forms, the overriding principle is that “where one party has, by his representations or conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage.” *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959).

The frame of ERISA jurisprudence is the statutory scheme, specifically remedial provision 29 U.S.C. §1132. Added to that frame is a developed federal common law of rights and obligations of ERISA-regulated plans. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S. Ct. 1549 (1987). The federal common law applied in ERISA cases is often derived from state law because of the states’ greater experience in interpreting insurance contracts and rules that relate to insurance contracts. *Alexandra H. v. Oxford Health Ins. Inc. Freedom Access Plan*, 833 F.3d 1299, 1307 (11<sup>th</sup> Cir. 2016). The central goals of ERISA are “1) protection of the interests of employees and their beneficiaries in employee benefit plans, and 2) uniformity in the administration of employee benefit plans.” *Id.* In analyzing whether a federal common law legal doctrine should be applied in an ERISA case, courts in the Eleventh Circuit evaluate whether the doctrine would further ERISA’s scheme and goals. *Id.*

**2. Application of Equitable Estoppel By Silence Protects Participants of the NFL Plans**

Allowing equitable estoppel by silence in this case furthers the goals of protecting the interests of former NFL players who are participants in the NFL welfare benefit plan for two

important reasons.

The first reason is that it complements the comprehensive claims procedures of ERISA. The claims procedures require a full review of a benefit claim and a fiduciary's *full* and fair review of a claim that is denied in whole or in part. 29 U.S.C. §1133(2) and 29 CFR §2560.503-1. (emphasis added). Plan participants of the NFL Plans depend upon a full review of their claims rather than a thirteen-year silence followed by a surprise attack launched over their initial application and the documents provided with that application. In this instance, the Board members seek the financial devastation of Keys by claiming the right to claw back benefits that have been paid to him for over a decade. The doctrine of equitable estoppel by silence is a doctrine that protects the interests of the participants of the Plans and is consistent with ERISA's claims procedures. The doctrine enforces a participant's right to a full review. Equitable estoppel based upon silence should be permitted for that reason.

The second reason that supports the application of equitable estoppel based upon silence in this case derives from a broader sense of equity. A beyond-belated attack on a player's application for benefits, when the information was available for further investigation when the application was first considered, is inequitable. By comparison, in the insurance industry and the regulation of that industry, a first cousin to the NFL Plans that provide pension and welfare benefits, most states require that incontestability clauses be included in life insurance policies. An incontestability clause places a burden of timely investigation on an insurance carrier with respect to the information in an insurance application. In Florida, for example, a life insurance policy is required to have an incontestability clause that provides that after two years from the date of issuance, an insurer cannot go back and contest payment on the policy due to a misrepresentation in the application. Section

627.455, *Florida Statutes*.<sup>1</sup>

State legislatures across the country recognize the unfairness, and the financial devastation, that can occur when benefits are denied based upon allegations of misrepresentation in an application. Those statutes, although not applicable to the NFL Plans, demonstrate a broad recognition of the inequitable nature of attacking a participant's application for benefits after the policy has been in effect for an extended period of time. In this case, equitable estoppel based upon silence provides a remedy for a similar inequity.

### **3. Equitable Estoppel by Silence Does Not Infringe Upon the Uniformity in Administration of Benefit Plans**

Section 1144 of ERISA is the preemption provision. It provides that the remedial provision of ERISA, section 1132, and other provisions within Subchapter I of ERISA, are to supersede any and all state laws insofar as they relate to benefit plans governed by ERISA. By enacting a broad preemption provision, Congress intended to create a relative uniformity in ERISA plan administration across the United States. The provisions of ERISA were meant to offer a ““careful balancing’ between ensuring fair and prompt enforcement of rights under the plan and the encouragement of the creation of such plans.” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life*, 107 S. Ct. 1549)).

The concern with uniformity is the concern that a “patchwork of different interpretations of a plan . . . ‘would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.’” *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (quoting *Fort Halifax*

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<sup>1</sup> Although Keys raises the issue of incontestability clauses to show that a belated attack on a life insurance application is recognized as inequitable and that the Board’s actions here are similarly inequitable, Keys did not misrepresent anything in his application.

*Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). The application of equitable estoppel based upon silence in an ERISA benefits case does not lead to a patchwork of different interpretations of the same benefit plan, nor does it infringe upon the rules for administering claims. The Plans must concede that a fiduciary's decision to claw back thirteen years of benefits is a rare decision indeed. Although Keys firmly believes that equitable estoppel due to silence, applied to prevent the claw back of paid benefits, fits the peculiar facts of this case, most ERISA benefits cases will not involve similar conduct by a fiduciary. Rather than disturbing uniformity, application of equitable estoppel based upon silence under the unique circumstances of this case complements the statutory provisions of ERISA and aids in the enforcement of the duty of a fiduciary to fully review a claim. It compels the fiduciary to have a timely dialogue with the claimant about any issues that the fiduciary would like to investigate before deciding the claim.

Lastly, in this instance, application of equitable estoppel due to silence furthers ERISA's schemes and goals by protecting participants of the plan and by encouraging plan administrators to have a timely dialogue with claimants concerning issues they wish to investigate which, in turn, leads to greater uniformity in plan administration.

**4. Keys' Response to the Plans' Claim that State Law Equitable Estoppel Claims are Preempted.**

The Plans contend that ERISA preempts any state law equitable estoppel claims. Defendants' Motion to Dismiss, p. 5 (Doc. 38). The Plans are mistaken. Section 1144 of ERISA provides for the preemption of any state law claims related to benefit plans governed by ERISA. However, although a legal doctrine may have its origin in state law, once adopted by the federal courts, that same legal doctrine is not subject to ERISA's preemption provision. As mentioned previously, federal courts within the Eleventh Circuit have adopted equitable estoppel based upon

silence as a common law doctrine. *United States Life Ins. Co. in the City of New York v. Logus Mfg. Corp.*, 845 F. Supp. 2d 1303, 1318 (S.D. Fla. 2012); *see also Whetstone Candy Co., Inc. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1076 (11<sup>th</sup> Cir. 2003).

Since the doctrine has become part of the legal fabric of the federal common law established by the Eleventh Circuit, the determination as to whether that federal common law doctrine can be applied in an ERISA case turns on whether the proposed doctrine furthers ERISA's scheme and goals. *Alexandra*, 833 F.3d at 1307. As previously discussed, application of equitable estoppel based upon silence in this case is consistent with ERISA's scheme and goals in this case.

### **Conclusion**

The Plans' Motion to Dismiss Count III of Keys' Amended Complaint should be denied. Keys has pled a cause of action that meets the requirements of equitable estoppel based upon silence. The doctrine should be applied in this case because it is consistent with the goals of ERISA and is not preempted.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNT III OF PLAINTIFF'S FIRST AMENDED COMPLAINT** has been electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that a true and correct copy of the foregoing will be furnished to counsel of record through the CM/ECF system on this 8<sup>th</sup> day of July, 2019.

/s/ Lansing C. Scriven